Office Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-341

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD L. ROSENFELD,
Petitioner,

vs.

ARTHUR COHN AND MICHAEL ARTHUR FILM PRODUCTIONS,
a company doing business
under the laws of Lichtenstein,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PATRICIA L. GLASER, ESQ.
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT, a
partnership including
professional corporations
2049 Century Park East
Fourteenth Floor
Los Angeles, California 90067
Counsel for Respondents.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

BEST AVAILABLE COPY

23pp

QUESTIONS PRESENTED

Whether a limited liability company, organized under the laws of Lichtenstein and recognized by Lichtenstein as a fully independent juridical person, is a citizen of a foreign state within the meaning of 28 U.S.C. section 1332(a)(2).

Whether damages may be awarded for the intentional breach of a licensing agreement that is legal in its subject matter and entered in contemplation of a collateral transaction that is both accepted and standard in the place where performance is to be rendered.

SUBJECT INDEX

	Page
Questions Presented	i
Table of Authorities	iii
Summary of Reasons For Denying The Writ	v
Statute Involved	1
Statement of the Case	2
Reasons For Denying The Writ	6
I.	
A Limited Liability Company Organized Under the Laws of Lichtenstein and Recognized by Lichtenstein as a Fully Independent Juridical Person is a Citizen of a Foreign State for Diversity Purposes	7
II.	
The District Court Correctly Awarded Respondents Damages For Petitioner's Intentional Breach of a Licensing Agreement Which Was Legal in Its Subject Matter and Which Contemplated a Collateral Transaction That is Both Accepted and Standard In the Place Where Performance Was To Have Been Rendered	14
Conclusion	16

TABLE OF AUTHORITIES

Cases Page

Baker v. Götz, 336 F.Supp. 197 (D.Del. 1971), aff'd without opinion, 492 F.2d 1238 (3rd Cir. 1974), cert. denied, 417 U.S. 955 (1974) 8, 9

Batson Yarn & Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau, 311 F.Supp. 68 (D.S.C. 1970) 8

Baumgarten v. Alliance Assur., Co. Limited, of London, England, 153 F. 301 (N.D. Cal. 1907) 9

Chapman v. Barney, 129 U.S. 677 (1889) 10

Encherman v. Canada S.S. Lines, Limited, 57 F.Supp. 275 (S.D.N.Y. 1944) 9

Fasco, A.G. v. Modernage, Inc., 311 F.Supp. 161 (W.D. Pa. 1970) 8

Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900) 10

Ippolito v. Societa Di Navigazione Italia, 100 F.Supp. 73 (D. Mass. 1951) 9

James Wood General Trading Establishment v. Coe, 297 F.2d 651 (2d Cir. 1961) 8

Murarka v. Bachrack Bros., Inc., 215 F.2d 547 (2d Cir. 1954) 11

Nat. Steamship Co. v. Tugman, 106 U.S. 118 (1882) ... 7

Navarro Savings Association v. Lee, 446 U.S. 458 (1980) 10, 12

Newfoundland American Insurance Company, Ltd. v. Suesz, 289 F.2d 694 (10th Cir. 1961) 9

Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) 8, 9, 10, 12, 13

R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, 336 F.2d 160 (4th Cir. 1964) 10

TABLE OF AUTHORITIES CITED

CASES	Page
United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945)	14
United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145 (1965)	10
Statutes	
Title 28, U.S.C. section 1332(a)	1
Title 28, U.S.C. section 1332(a)(2)	v, 3, 4, 6, 7, 8, 11, 12
Title 28, U.S.C. section 1332(c)	v, 10, 11
Title 28, U.S.C. section 1603(a)	2
Rules	
Supreme Court Rule 17, 28 U.S.C.A.	6
Treatises	
17 Am.Jur.2d, Contracts § 158 (1964)	15
Areeda & Turner, Antitrust Law (1st ed. 1978)	14
6A Corbin on Contracts (1962)	15

SUMMARY OF REASONS FOR DENYING THE WRIT

It is well-settled that a foreign company is a "citizen of a foreign state" if its legal personality is so complete that there is no adequate reason for holding that it has a different status for jurisdictional purposes than that of a corporation. Caselaw addressing whether unincorporated *domestic* business entities should be treated as corporations for diversity purposes, and therefore given a "conclusive presumption" of citizenship under 28 U.S.C. section 1332 (c), is not relevant. In fact, the courts have *never* applied section 1332(c) to foreign companies which have their principal place of business outside the United States. Instead, they have asked whether the foreign company is recognized as a juridical person under the laws by which it was formed. If so, the foreign company is a "citizen of a foreign state" within the meaning of section 1332(a)(2).

The legality of the practice in Europe of selling motion pictures in a package was established in the proceedings below. The District Court's finding was not challenged on appeal. The antitrust laws of the United States are not applicable in the instant case because the package sale contemplated was to take place in Europe, where such sales are both accepted and standard. The transactions herein in question did not affect competition within the United States or export competition from the United States. Therefore, irrespective of how this country's antitrust laws may view the practice of selling motion pictures in a package, the enforceability of the licensing agreement breached by petitioner in Europe is not affected thereby.

No. 84-341

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD L. ROSENFELD,
Petitioner,

vs.

ARTHUR COHN AND MICHAEL ARTHUR FILM PRODUCTIONS,
a company doing business
under the laws of Lichtenstein,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATUTE INVOLVED

28 U.S.C. § 1332(a):

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) *citizens of a State and citizens or subjects of a foreign state;*

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a state or of different states (emphasis added)

STATEMENT OF THE CASE

Respondents Arthur Cohn ("Cohn") and Michael Arthur Film Productions ("Film Productions") find the complete tenor of petitioner Richard L. Rosenfeld's ("petitioner") Statement of the Case objectionable. (Petition, pages 3-7) Its disparagement of the motion pictures that petitioner agreed to license to Film Productions as "old black and white films" (Petition, pages 4, 5) that "had no merit" (Petition, page 4) is totally unwarranted, given the fact that petitioner was to receive the sum of $20,000 for them. More importantly, the claim that there was "overwhelming evidence" that Film Productions was a "trust" (Petition, pages 6-7) is a deliberate distortion of the facts presented to the Courts below. Such a distortion, and others like it, cannot justify the issuance of this Court's writ.

In 1977, petitioner agreed in writing to grant Film Productions an exclusive license to exhibit seven motion pictures in Europe. (Petition, Appendix, page A16) Petitioner fully "warranted and guaranteed" that he owned the pictures and had the absolute right to grant Film Productions the exclusive license. (Petition, Appendix, page A17) Notwithstanding his warranties, petitioner *breached* his agreement with Film Productions in 1978 by persistently refusing to deliver the motion pictures. (Petition, Appendix, page A18) Due to petitioner's breach, Film Productions was forced to abandon its prior commitment to sell the pictures as part of a thirty picture package to a German television

network. (Petition, Appendix, pages A18-19) Petitioner was well aware that respondents' purpose in entering into the licensing agreement was to obtain motion pictures to sell in a package with other motion pictures. (Petition, Appendix, page A18) Petitioner's failure to deliver the promised motion pictures forced Film Productions to agree to a much less lucrative sale of a ninety-six picture package to a different company. (Petition, Appendix, pages A18-19) Because the profits thus obtained were substantially less than what they would have been but for petitioner's breach, respondents filed suit, established petitioner's liability for their losses at trial and obtained an award of damages from the District Court, which damages were calculated on the basis of respondents' lost profits. (Petition, Appendix, pages A15-21)

Subsequent to the trial on the merits and the entry of its Findings of Facts and Conclusions of Law, the District Court held its judgment in abeyance and held a new trial on a single issue: whether respondents had established subject matter jurisdiction based on diversity under section 1332(a)(2). (Petition, Appendix, page A22) The Court delivered a subsequent written opinion devoted entirely to this issue on February 22, 1983 (Petition, Appendix, pages A22-28) in which it held that Film Productions was a juridical entity existing under the laws of Lichtenstein and therefore a citizen or subject of a foreign state within the meaning of section 1332(a)(2).

While petitioner's Statement of the Case does not contest these undisputed facts, it contains several specific misstatements with respect to the nature of Film Productions that must be corrected. Initially, petitioner claims that Film Productions was "admittedly organized as a business trust." (Petition, page 4) Such a claim simply has no basis in the record or the findings of the Courts below. As noted by District Judge Byrne, in his opinion addressed entirely

to the issue of whether Film Productions is a citizen of a foreign state within the meaning of section 1332(a)(2):

> "[petitioner] offered no evidence to indicate that [Film Productions] is not a company organized under the laws of Lichtenstein. In fact, [petitioner's] own expert testified that the *anstalt* is a company expressly provided for by statute in Lichtenstein and stated that he was familar with such business organizations .... He stated that *an anstalt may sue or be sued in its own name, and that when a recovery is made it becomes an asset of the company, not the individual owners or directors.*"

(Petition, Appendix, page A27) (emphasis added)

Indeed, petitioner even acknowledges that respondents never "admitted" that Film Productions was a "business trust" when he states that Film Productions "elected to base its claim of subject matter jurisdiction on the sole ground that [it] was a corporation." (Petition, page 6) However, even this statement is both inaccurate and misleading. Respondents have consistently contended that Film Productions is a limited liability company organized under the laws of Lichtenstein and known as an *anstalt* — they have never claimed that Film Productions is a corporation. Rather, respondents have contended that Film Productions is entitled to the *status* of a corporation for diversity purposes.

Respondents also object to petitioner's repeated characterization of Film Productions as a "front." (Petition, pages 6, 14) Both the registration certificate and the bylaws of Film Productions were offered into evidence in the District Court to establish that Film Productions is a fully lawful limited liability company. (Petition, Appendix, page A27) Petitioner offered no evidence in rebuttal of that fact. The company was founded in Lichtenstein in 1952, well

before the filing of the complaint in the instant case. (Petition, Appendix, page A27) The District Court also noted that respondent Cohn is a director of the company and a member of its Board of Administration. (Petition, Appendix, page A27) Pursuant to Lichtenstein statute, the company is recognized as a "legally independently organized enterprise . . . subject to the regulations of governing trust companies with juridical personality." (Petition, Appendix, page A27) Therefore, by no strentch of the imagination can Film Productions be characterized as a "front".

Respondents further object to petitioner's unfounded assertion that an *anstalt* "can be organized as a corporation or as a business trust" and that Film Productions "was in fact organized as a business trust." (Petition, page 6) This assertion creates a false dichotomy that is entirely unsupported by the record. Petitioner attempts to exploit this false dichotomy by later contending that he "demonstrated 'persuasively that the *anstalt* resembles a business trust but not a corporation.' " (Petition, page 12) Such a contention grossly *mis*states the facts and findings below. The Court of Appeals commented that petitioner *"argued"* that the *anstalt* resembles a business trust (Petition, Appendix, page A5) and, in any event, found the issue of whether an *anstalt* resembles a business trust to be entirely irrelevant. Indeed, District Judge Byrne never even used the term "business trust" in his opinion on the jurisdictional issue. (Petition, Appendix, pages A22-28)

Upon closer examination, as set forth in the reasons for denying the writ enumerated below, it is apparent that petitioner's sudden insistence that Film Production is a "business trust" is part of his attempt to come within the precedential scope of a recent decision by this Court that is entirely inapplicable to the instant case. Such an attempt, based as it is on deliberate distortions of the facts and findings below, cannot justify the issuance of a writ of certiorari.

REASONS FOR DENYING THE WRIT

The instant petition raises two issues: (1) whether a limited liability company recognized as a juridical person under the laws of Lichtenstein is a "citizen of a foreign state" for the purpose of determining diversity jurisdiction under 28 U.S.C. section 1332(a)(2); and (2) whether petitioner may avoid liability for the indisputable breach of his licensing agreement with Film Productions on the ground that the agreement contemplated that Film Productions would sell in a package the motion pictures it would have acquired from petitioner.

On either issue, petitioner has failed to show, pursuant to Rule 17.1 of the Rules of this Court, any compelling reason for the issuance of a writ of certiorari. No conflict among the circuits, no important constitutional issue and no novel question of first impression has been raised to support this Court's exercise of its discretion to hear this cause. Supreme Court Rule 17.1(a), 28 U.S.C.A.

With respect to the first issue, the federal courts have always held that foreign companies are citizens of foreign states so long as their legal personalities are so complete under the laws by which they were formed that there is no adequate reason for holding that they have a different status for diversity purposes than that of a corporation. Petitioner's argument to the contrary rests on a mischaracterization of the facts below and the application of unrelated legal principles. As such, it is unworthy of this Court's review.

With respect to the second isue, petitioner did not challenge on appeal the District Court's finding that the licensing agreement and related transactions within the contemplation of the parties were not invalidated by the antitrust laws of the United States. Our antitrust laws are not applicable to the transactions herein in question because com-

petition within the United States or export competition from the United States have not been affected thereby. Because respondents' package sale of the motion pictures to have been acquired from petitioner conformed to an accepted and standard practice in Europe, it cannot be used to avoid petitioner's contractual obligations.

I.

A LIMITED LIABILITY COMPANY ORGANIZED UNDER THE LAWS OF LICHTENSTEIN AND RECOGNIZED BY LICHTENSTEIN AS A FULLY INDEPENDENT JURIDICAL PERSON IS A CITIZEN OF A FOREIGN STATE FOR DIVERSITY PURPOSES

Diversity jurisdiction was predicated in the instant case upon the fact that respondent Cohn is a citizen of Switzerland and respondent Film Productions is a limited liability company duly existing under the laws of Lichtenstein. In paragraphs 2 and 3 of its Findings of Fact and Conclusions of Law, dated October 15, 1979, the District Court expressly found that both respondents have foreign citizenships and that, because petitioner is a resident of California, it had diversity jurisdiction under 28 U.S.C. section 1332(a)(2). (Petition, Appendix, pages A15, A21)

Corporations organized under the laws of foreign states are without question "citizens" of those states for purposes of diversity. *Nat. Steamship Co. v. Tugman,* 106 U.S. 118 (1882). In the instant case, both the District Court and the Court of Appeals found that Film Productions, as an *anstalt*: (1) has liability limited to its capitalization; (2) can both sue and be sued in its own name; and (3) may claim any recovery in this litigation as its own asset. (Petition, Appendix, pages A7, A15, A27) In these essential aspects, the legal personality of Film Productions is so complete that there is no adequate reason for treating it differ-

ently than a corporation for diversity purposes. After thoroughly considering all of the attributes of an *anstalt*, the Courts below properly held that Film Productions must be considered a citizen of Lichenstein for diversity purposes because it is recognized as a fully independent juridical person under that country's laws.

Notwithstanding petitioner's argument to the contrary, foreign companies that are recognized as juridical persons are citizens of foreign states for jurisdictional purposes *not* because they are "corporations" *per se*, but because their legal personality is so complete that there is no adequate reason for holding that they have a different status for purposes of federal jurisdiction than that occupied by corporations. *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). Accordingly, petitioner is mistaken when he relies only on the conclusions of the courts in *Fasco, A.G. v. Modernage, Inc.*, 311 F.Supp. 161 (W.D.Pa. 1970) and *Batson Yarn and Fabrics Machinery Group, Inc. v. Saurer-Allma GmbH-Allgauer Maschinenbau*, 311 F.Supp. 68 (D.S.C. 1970). (Petition, pages 11-12) The Courts below placed reliance on these cases (Petition, Appendix, pages A6, A26-27) because in each case, a foreign business entity which had no domestic counterpart was found to be a "citizen of a foreign state" under section 1332(a)(2).

Other Federal courts have recognized that an *anstalt* is a corporate citizen of Lichtenstein for purposes of federal diversity jurisdiction. *James Wood General Trading Establishment v. Coe*, 297 F.2d 651, 652-3 (2d Cir. 1961); *Baker v. Götz*, 336 F.Supp. 197 (D.Del. 1971), *aff'd without opinion*, 492 F.2d 1238 (3rd Cir. 1974), *cert. denied*, 417 U.S. 955 (1974). In *Baker*, the district court expressly noted that diversity jurisdiction was properly predicated upon section 1332(a)(2) where the named defendants were either "natural persons, 'juridical persons', or corporations, all of whom [were] citizens of foreign states and reside[d] in

continental Europe." 336 F.Supp. at 200. Moreover, a variety of foreign entities have been deemed to have corporate status for diversity purposes notwithstanding the fact that they are called something other than a "corporation." *E.g., Newfoundland American Insurance Company, Ltd. v. Suesz,* 289 F.2d 694, 695 (10th Cir. 1961) (Canada); *Baumgarten v. Alliance Assur. Co., Limited, of London, England,* 153 F. 301, 303 (N.D. Cal. 1907) (England and Ireland); *Ippolito v. Societa Di Navigazione Italia,* 100 F.Supp. 73 (D. Mass. 1951) (Italy); *Encherman v. Canada S. S. Lines, Limited,* 57 F.Supp. 275 (S.D.N.Y. 1944) (Canada).

Petitioner cavalierly claims that the Court of Appeals "departed" from established precedent in finding diversity "without any proof of the citizenship of the real parties in interest." (Petition, page 12) In fact, the Court of Appeals *adhered* to controlling precedent. In relying upon this Court's decision in *Puerto Rico v. Russell & Co.,* 288 U.S. 476 (1933) (*"Russell"*), the Court of Appeals reaffirmed the established principle that *foreign* business entities are treated like corporations by the federal courts where their legal personality is "so complete" under the laws by which they were formed that there is "no adequate reason for holding that [they have] a different status for purposes of federal jurisdiction than a corporation organized under that law."[1] *Russell,* 288 U.S. at 482.

---

[1]Petitioner cannot escape the precedential effect of *Russell* by contending that it was not a "diversity case". (Petition, page 10). *Russell* directly addressed the issue of whether the legal personality of a *sociedad en comandita* was "so complete in contemplation of the law of Puerto Rico" that removal could not be predicated upon the residence of its members. *Russell,* 288 U.S. at 482. The instant case raises the identical issue of whether the legal personality of Film Productions is "so complete" that it must be considered a citizen of Lichtenstein for diversity purposes irrespective of the residence of its members.

Petitioner attempts to draw this Court's attention to the Fourth Circuit's reading of *Russell* found in *R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 336 F.2d 160 (4th Cir. 1964), while ignoring this Court's subsequent consideration of *Russell* in *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965). In *Bouligny*, this Court held that the determination of whether an unincorporated labor union in the United States should be treated as a citizen for diversity purposes, without regard to the citizenship of its members, was a legislative matter. *Id.* at 153. In the course of its opinion, this Court recognized that *Russell* involved "the problem . . . of fitting an exotic creation of the civil law . . . into a federal scheme which knew it not." *Id.* at 151. The Court of Appeals recognized in the instant case that it was presented with the exact same problem. (Petition, Appendix, page A6) Thus, both *Russell* and *this* Court's reading of *Russell* in *Bouligny* support the approach taken by the Court of Appeals below. (Petition, Appendix, pages A4-5)

Petitioner also points out that *domestic* unincorporated associations are not conclusively presumed to be citizens of the same State in which their business enterprise is established or conducted. (Petition, page 8, citing *United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc., supra; Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 454-58 (1900); *Chapman v. Barney,* 129 U.S. 677 (1889)) Such a conclusive presumption was codified for domestic corporations by the enactment of section 1332(c). *Navarro Savings Association v. Lee,* 446 U.S. 458, 461, n.7 (1980). As the Court of Appeals noted, however, petitioner's reliance on the narrow construction given section 1332(c) by the federal courts is "fundamentally wrong" (Petition, Appendix, page A5) and his comparison of unincorporated *domestic* business entities with *foreign* companies formed under the civil law is "virtually meaning-

less." (Petition, Appendix, page A8) The Court of Appeals recognized that the existence or nonexistence of a "presumption" with respect to *domestic* business entities was entirely irrelevant to its determination of the citizenship of *foreign* companies because:

> foreign nations make their own laws regarding the formation of legal entities. Under section 1332(a)(2) we ask only whether an entity is regarded as a juridical person by the law under which it was formed.

(Petition, Appendix, page A8) *Cf., Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547, 553 (2d Cir. 1954) (each country may determine who its nationals are, which determination will generally be accepted by other nations).

The contrary approach urged by petitioner has *never* been followed by the federal courts in determining diversity under section 1332(a)(2). As correctly noted by the District Court, section 1332(c) does not apply to an alien corporation with its principal place of business outside the United States. (Petition, Appendix, page A24) In the instant case, there was no evidence presented to the District Court which even suggested that Film Productions did *any* business in the United States. Petitioner's only contacts with either respondent occurred in Europe; the letters by which petitioner expressly breached the licensing agreement were sent to Switzerland and Lichtenstein. (Petition, Appendix, page A18) The limitations imposed upon the scope of section 1332(c) with respect to unincorporated *domestic* business entities are therefore entirely irrelevant in the instant case.[2]

---

[2]The Court of Appeals expressly noted that section 1332(c) was irrelevant to its consideration of the jurisdictional question presented "because Film Productions does not have its principal place of business in the United States." (Petition, Appendix, page A7)

Petitioner nevertheless claims that the holding of the Court of Appeals in the instant case was that the "conclusive presumption" recognized for domestic corporations applies to all foreign business entities. (Petition, page 9) In fact, the Court of Appeals recognized the foreign citizenship of Film Productions because the company is a juridical person with a complete legal personality of its own. It made this determination after carefully considering the company's attributes as an *anstalt* to determine whether it is a juridical person under Lichtenstein law. (Petition, Appendix, pages A6-7) The Court of Appeals also noted that it need not examine the "corporateness" of foreign business entities such as an *anstalt* in its analysis under section 1332(a)(2). (Petition, Appendix, pages A5-6) Therefore, it cannot be contended that the Court of Appeals relied on any presumption. But even if petitioner's "conclusive presumption" analysis is applied to the question presented, it would not yield a different result than that reached by the Courts below. As noted in *Russell,* the "conclusive presumption" applied to corporations is theoretically justified by "the complete legal personality with which corporations are endowed." *Russell, supra,* 288 U.S. at 479. Because Film Productions has a "complete legal personality" under the laws of Lichtenstein, it too would have every right to the benefit of such a "conclusive presumption."

Petitioner's reliance on this Court's decision in *Navarro Savings Association v. Lee,* 446 U.S. 458 (1980), is also misplaced. According to petitioner, *Navarro* should be read to mean that unless a foreign company is a corporation, it cannot be considered a citizen of a foreign state. (Petition, pages 12-13) However, *Navarro* is entirely bereft of any consideration of section 1332(a)(2) and "involve[d] neither an association nor a corporation." *Id.* at 462. In fact, the Court in that case *expressly* disclaimed

any intent to compare the issue before it with its approach to the citizenship of business entities for purposes of diversity:

> *The Court has never analogized express trusts to business entities for purposes of diversity jurisdiction.* Even when the Court espoused the view that a corporation lacked citizenship, *Bank of United States v. Deveaux,* 5 Cranch at 91, Mr. Chief Justice Marshall explained that the doctrine had no bearing on the status of trustees. (Emphasis added.)

Id. at 463, n. 10.

In sum, petitioner has failed to show any basis for the issuance of a writ of certiorari to reexamine the issue of subject matter jurisdiction. There is no controversy among the federal courts on this issue. In fact, the courts have never found it necessary to belabor the point that, for purposes of federal jurisdiction, a foreign company whose legal personality is so complete as to make it a juridical person under the laws by which it was formed is treated no differently than a corporation existing under the same laws. Such treatment is clearly in conformance with this Court's holding in *Russell.* By denying the petition for writ of certiorari, this Court will allow this well-settled rule to stand.

II.

THE DISTRICT COURT CORRECTLY AWARDED RESPONDENTS DAMAGES FOR PETITIONER'S INTENTIONAL BREACH OF A LICENSING AGREEMENT WHICH WAS LEGAL IN ITS SUBJECT MATTER AND WHICH CONTEMPLATED A COLLATERAL TRANSACTION THAT IS BOTH ACCEPTED AND STANDARD IN THE PLACE WHERE PERFORMANCE WAS TO HAVE BEEN RENDERED

The District Court expressly rejected petitioner's contention that the application of the antitrust laws of the United States prevented it from awarding respondents damages, as measured by their lost profits. District Judge Byrne found the practice of selling motion pictures in a package to be accepted and standard in Europe. (Petition, Appendix, page A19) Petitioner did not object to this finding in the Court of Appeals.

In the instant case, performance of the licensing agreement, and any collateral transactions within the contemplation of the parties, was to take place in Europe. (Petition, Appendix, page A16) None of the transactions had any connection with the United States. By finding that "the practice of selling motion pictures in packages to television is accepted and standard in all relevant parts of Europe" (Petition, Appendix, page A19), the District Court determined that petitioner's challenge to the enforceability of the licensing agreement on this basis lacked merit.

The antitrust laws of the United States are not applicable to the transactions herein in question because competition within the United States or export competition from the United States have not been affected thereby. *United States v. Aluminum Co.*, 148 F.2d 416, 443-44 (2d Cir. 1945); Areeda & Turner, *Antitrust Law* "Foreign Commerce: General Principles" ¶¶ 236-238 (1st ed. 1978). Because

our antitrust laws do *not* apply, petitioner cannot contend, let alone establish, that there was anything illegal about his agreement with Film Productions.

Moreover, the legality of a contract performance is determined by the place where it has been or is to be rendered. 6A *Corbin on Contracts* § 1374 at 9 (1962). It is well-settled that unless a contract necessarily contemplates an illegal act, it is not unenforceable. 17 Am.Jur.2d, *Contracts* § 158 (1964). Petitioner *knew* that respondents' purpose in contracting with petitioner was "to obtain motion pictures to license to German television stations or networks in a package with other motion pictures." (Petition, Appendix, page A18) As the Court of Appeals noted:

> [petitioner] is an experienced, sophisticated businessman who was aware of the nature of his agreement with Cohn and Film Productions.

(Petition, Appendix, page A10). Petitioner obviously understood the European practice of selling motion pictures in a package when he entered the licensing agreement and knew that such a practice was entirely legal in Europe. For him to contend now that the licensing agreement was "based on . . . capricious and unlawful practices" (Petition, page 15) is therefore highly suspect.

In sum, the antitrust laws of the United States do not apply to the licensing agreement because it was neither negotiated nor to be performed in the United States and did not affect competition within or export competition from the United States. The District Court expressly found that the practice of selling motion pictures in a package was accepted and standard in Europe, where all sales within the contemplation of the parties were to take place. Because respondents' package sales, which were to include motion pictures acquired from petitioner, were entirely legal in the place where they were to occur, peti-

tioner cannot escape liability for his breach of the licensing agreement on this basis.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: October 2, 1984

Respectfully submitted,

PATRICIA L. GLASER, ESQ.
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT,
a partnership including
professional corporations
2049 Century Park East
Fourteenth Floor
Los Angeles, California 90067

Counsel for Respondents
Arthur Cohn and
Michael Arthur
Film Productions